supplement the exercise of federal authority for the purpose of effecting railroad safety.

With respect to the error below, we would only add to the demonstrations of the petitions that the Supreme Court of Pennsylvania appears to have reasoned, from the inapposite law of physics, that two bodies of legislation cannot constitutionally occupy the same place at the same time. From this the Court concludes that, since Congress has legislated with regard to railroad signaling, albeit only mechanical signaling, the Supremacy Clause would outlaw any body of state law in the same general field of signaling even though concerned only with non-mechanical signaling. For purposes of the constitutional inquiry at hand, however. the reasoning depends upon whether the two sets of laws, federal and state, can *compatibly* operate within the same general field of activity or endeavor at the same time.

The Pennsylvania decision illustrates that questions whether state regulatory patterns burden interstate commerce or are foreclosed by exercise of federal power cannot be resolved by stereotype words and phrases. Resolution of such questions depends upon an individualized analysis of the totality of relevant circumstances, what this Court has described as "particularized inquiry". *Colorado Anti-Discrimination Commission* v. *Continental Airlines*, 372 U.S. 714, 720-721 (1963). Thus it is that while on the given facts of one case of alleged preemption "'. . . coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go,'" yet under other circumstances the "mere 'fact of identity does not

mean the automatic invalidity of state measures.'" *Colorado, supra,* 372 U.S. at p. 722.

As amply demonstrated by the petitions, "particularized inquiry" into the facts of this case suggests no discord between federal authority granted to regulate mechanical signaling devices and supplementary state authority regulating manual signaling. Indeed both harmoniously serve their common purpose of railroad safety; their dual existence accords with this Court's teaching that "To hold a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." *Colorado, supra,* 372 U.S at p. 722.

It is questionable whether the court below was concerned with the question whether in fact the federal and state controls could result in a workable relationship or whether it postured the question of validity of the state action on potential frustration of the federal purpose. In any event, it appears to have assumed that federal supremacy could only be assured by lending distance between federal and state exercises of authority so that once the federal government had exercised *any* authority, no matter how limited that exercise and how broad the area of commerce involved, the state would be automatically foreclosed. The resulting *modus operandi* is almost as if the United States Constitution had thus been rewritten to assume a necessary incompatibility between *any* state and *any* federal regulation within the broad boundaries of any general area of commerce without regard to whether conflict between the two is actual or truly potential.

II. THE ERROR BELOW IS OF NO MERE PAROCHIAL CONCERN: ITS LOGIC ENDANGERS CONSIDERABLE LOCAL LAW COMPLEMENTING UNFORTUNATELY LIMITED FEDERAL RAIL SAFETY MEASURES

A. Existing Federal and State Railroad Safety Measures Are Wholly Inadequate.

Even without the strictures applied by the court below, there is an ever increasing problem of railroad safety in the United States, a problem which occasioned the 90th Congress to commence hearings on Federal Standards for Railroad Safety proposed by various bills that had been introduced into the Congress including an Administration measure denominated H.R. 16980. Copies of the record of those hearings[4] have been lodged with the Clerk of this Court.

As reflected by examination of the statutes and as testified to in the aforementioned hearings, the federal laws on the subject of railroad safety, presently administered by the Department of Transportation, "are limited in scope, designed many years ago to meet specific hazards." *Hearings,* fn. 4, at p. 8. In totality the federal statutes include: The Safety Appliance Act (45 U.S.C. §§ 1-16), providing for power brakes and certain other mechanical safety equipment on locomotives and trains; the Ash-Pan Act (45 U.S.C. §§ 17-21), essentially obsolete with the disappearance of coal fuel steam locomotives; the Locomotive Inspection Act (45 U.S.C. §§ 22-34), requiring that locomotives be safe to operate and not a danger to life or limb; the Accidents Reports Act (45 U.S.C. §§ 38-43), providing for federal investigation of serious railroad accidents and certain recording by the carriers; and the Signal

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[4] *Hearings Before the House Committee on Interstate and Foreign Commerce,* 90th Cong. 2nd Sess., ser. 90-39 (1968).

Inspection Act (49 U.S.C. § 26), the statute which the court below held had preempted the regulatory area sought to be controlled by the particularized state law in question.

That existing federal railroad safety statutes are not intended to be all inclusive of the subject of railroad safety is evident from the fact that there is no existing federal statute or regulation covering such matters as freight houses and stations, train shops, grade crossings, health and sanitation, operating practices and procedures, emergency equipment on trains, tracks, roadbeds, tunnels and bridges, undercarriage of trains, rail yards, and track crew cars.

To supplement this episodic and limited federal concern with the broad problem of railroad safety, many of the states, acting under the police powers reserved to them, have adopted various safety measures affecting railroads. But even such supplementary state control is extremely spotty with only a handful of states having any type of broadly-based and effective regulatory patterns to aid in railroad safety. The law of most states is wholly inadequate to do the job.

The gross inadequacies of both federal and state law to meet the need for railway safety led to the initiation of the aforementioned recent congressional exploration of the overall problem. In opening those hearings on Federal Standards for Railroad Safety, the Chairman of the House Committee on Interstate and Foreign Commerce stated, on May 21, 1968:

> "This morning we come to railroad safety where for many years the Federal interest has been concerned only in a very limited way.
>
> "In the last few years there has been a steady increase in the number of railroad accidents. Five

> years ago it was said that part of this increase was attributable to a change in the statistical reporting requirements. But by 2 years ago when the report of the Bureau of Railroad Safety and Service of the Interstate Commerce Commission for fiscal year 1965 was issued, there could be no doubt that the increased number of railroad accidents was not a statistical fact but a most serious and grave situation." *Hearings,* fn. 4, at page 1.

Because, as indicated, limited existing federal laws were designed many years ago only to meet specific hazards then under consideration, it is not strange that only a small fraction of the causes for railroad accidents are within existing federal jurisdiction. In a letter to the Chairman of the House of Representatives Committee on Interstate and Foreign Commerce, the Chairman of the Interstate Commerce Commission wrote, under date of July 1, 1966, that:

> "To begin with, the report of the Committee does not acknowledge the Commission's limited jurisdiction in railroad safety operations. As our analysis indicates, approximately 97 percent of all accidents are attributable to causes over which we have no jurisdiction. The report leaves the connotation that there has been a deterioration in railroad safety as a result of our efforts since 1954. Our analysis indicates just the reverse since there has been approximately a 33 percent decline since 1954 in the number of accidents due to causes falling in the Commission's area of jurisdiction." *Hearings,* fn. 4, at p. 405.

Thus from the hearings on the subject of railroad safety already held by the 90th Congress—which, hopefully, are only the prelude to further exploration of

the subject in the next Congress—it has become abundantly clear:

(1) That existing federal statutory authority concerning railroad safety is antiquated, episodic in its reach, and intended only to relate to specific hazards which in years past had motivated Congress;

(2) That this limited federal authority potentially covers only approximately 3 or 4 percent of the causes for railroad accidents so that the remaining 96 or 97 percent of the causes for railroad accidents either must be covered by state law or not reached at all, and;

(3) That the total existing pattern of public law, both federal and state, is unable to control or abate the continuing year-by-year increase of railroad accidents.

These facts—the appalling juxtaposition of a rising accident rate and only limited federal resources to fight with—are pragmatic inducement for careful inquiry to assure that state police measures adopted for the safety of railroad workers and passengers are not lightly or loosely destroyed by unrealistic application of the Supremacy Clause.

B. The Reasoning Below Might Well Be Relied Upon To Nullify Other Supplementary State Measures Concerned With Railroad Safety.

On the books today there are many state statutes covering aspects of railway safety which are also covered by federal law. Yet the state statutes are not inconsistent with the federal statutes and, in general, serve the same intended safety purpose. For example, compare 49 C.F.R., 199.129, with Deering's Colo. Code,

Public Utilities, § 7606, on the subject of headlights on locomotives; 49 C.F.R. 231 with 114 Hurd's Ill. Stats. Annotated § 147, on the subject of handholds; 49 C.F.R. 232 with 114 Hurd's Ill. Stats. Annotated §§ 144, 148 and 151, on the subject of brakes and drawbars; 49 C.F.R. 294 and Pa. Public Utility Commission Railroad Regulations, Rule 2, on the subject of accident reporting.

The reasoning of the decision below might stultify the salutary efforts typified by these examples of attempts by the states, within their reserved police powers, to deal with a very real danger to the public and to reduce the safety hazards involved without substantial interference with interstate movement of trains or actual conflict with federal law. But see *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 779 (1944) and cases cited therein.

A very clear illustration of the potential impact of the holding below relates to a hazard to railroad trainmen about which testimony was given in the aforementioned congressional hearings. *Hearings,* fn. 4, at pp. 57-58. There an official of the Brotherhood of Railroad Trainmen testified that although federal law (the Safety Appliance Act) required that cars and locomotives be equipped with automatic couplers, that such couplers or drawbars be at a standard height above the roadway so that they might be uncoupled without the need of men going between cars and that grab irons or handholds be installed on the ends or sides of cars, the fact was that the task of coupling and uncoupling cars by trainmen is still among the most hazardous faced by railroad employees. The witness

noted that 8 men were killed and 1,017 injured in 1966 alone in performing such work. The witness explained that the danger arose in connection with manipulation of the uncoupling lever which, because unmentioned in the statute, was held to be beyond the control of existing federal administrative power for specifications of standards to govern the method of operating the uncoupling lever and attendant devices. The parallel of language and construction as between the Safety Appliance Act and the Signal Inspection Act are such that the decision below might foreclose efforts by the states through supplementary regulation to rectify this situation.

We have already noted that there are vast areas of railroad activity not presently reached by federal law which are principally responsible for the causes of railroad accidents. Is there a risk from conceptions like below that any efforts by the states to deal with problems in these areas might be held to be foreclosed because of impingement on an area within which the federal government has already acted, even though in a limited way which could not create a conflict as between state and federal law? Or suppose, instead of enacting overall legislation on railroad safety, the next Congress or future Congresses should determine merely to follow existing patterns by legislating from time to time only to meet specific hazards. Should that ensue and the decision below stands, a risk would arise that needed supplementary state legislation would be frustrated even though not in actual conflict with federal law nor in an area inherently requiring national uniformity. See *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad*

Trainmen, et al., 318 U.S. 1, 4 (1943); *Atlantic Coast Line R.R.* v. *Georgia*, 234 U.S. 280, 287-291 (1914); *N.Y., New Haven & Hartford R.R.* v. *People of the State of New York*, 165 U.S. 628, 631-634 (1896).

Moreover, decisions like that below if permitted to stand—without the compelling logic of facts showing actual conflict with federal law or purpose or destruction of an intended pattern of national uniformity—will certainly tend to discourage state legislatures and state regulatory bodies from attempting needed controls. In short, the reach of the decision below could impair or destroy existing and future efforts of the states to retard the growth of railroad accidents and to increase the potentials of railroad safety.

CONCLUSION.

The flagging required by the law of Pennsylvania imposes no extraordinary burden upon railroads in Pennsylvania in transit from one state to another; those requirements in no way frustrate nor are they incompatible with the design and purpose of the federal Signal Inspection Act. A determination that the state regulations are valid will leave the federal law inviolate and, at the same time, will permit the local exercise of police power for the safety of employees and passengers to serve its salutary purpose. Thwarting that exercise of local police power, and thus nullifying necessary safeguards to help reduce the mounting problem of railway safety, is based below upon an unreasonable and erroneous application of the constitutional requirement of federal supremacy. Accordingly, those flagging procedures should be sus-

tained by this Court's granting the Petitions for a Writ of Certiorari and reversing the decision below.

Respectfully submitted,

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